UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In re: **Operation of the Missouri River System Litigation**	)	No. 03-MD-1555 (PAM)
STATE OF MISSOURI, ex rel. Jeremiah W. (Jay) Nixon,	)	
vs.	)	**Civil No. 0:06-cv-01616-PAM**
UNITED STATES ARMY CORPS OF ENGINEERS, FRANCIS J. HARVEY, SECRETARY OF THE ARMY, UNITED STATES DEPARTMENT OF DEFENSE, and BRIGADIER GENERAL GREGG F. MARTIN	)	
Defendants.	)	

MEMORANDUM IN OPPOSITION TO FEDERAL DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

SUMMARY

The Federal Defendants' (the "Corps") motion and memorandum in support ("FD Mem.") fails to address Missouri's central argument: National Environmental Policy Act ("NEPA") regulations require an environmental impact statement ("EIS") or a finding of no significant impact ("FONSI") whenever a federal agency undertakes action that has a significant environmental impact. The Revision[1] has a significant environmental impact.[2] The Corps did

[1]Missouri River Master Water Control Manual, Revision 1, Incorporation of Technical Criteria for Bimodal Spring Pulse Releases from Gavins Point Dam ("Revision")

[2]The Environmental Assessment for the Inclusion of Technical Criteria for Spring Pulse Releases from Gavins Point Dam (February 2006) ("EA") (Ex. 3088) concluded that benefits were reduced by the Revision in eight of fifteen categories compared. *Id.* at 091332-39. All

not prepare an EIS, nor did it issue a FONSI. The corps has not cited a single provision of the law or regulations, or identified a single case, that authorizes an agency to substitute an EA for an EIS or FONSI. Therefore, the Corps failed to follow the procedures prescribed by law and adoption of the Revision is arbitrary, capricious, and not in accordance with law.

The Corps does not dispute the predicates underlying Missouri's argument. Instead, it tries to finesse the conclusion that inevitably follows by casting the issue as a factual dispute over the adequacy of the EA it prepared instead of an EIS. FD Mem. at 19-22. To be sure, the analysis provided in the EA is inadequate in many respects, as noted in Missouri's memorandum in support of its motion for summary judgment ("MO Mem."). MO Mem. at 17-20. The EA's shortcomings, however, are not at the heart of this dispute. They merely demonstrate what happens when an agency evades the mandated NEPA process: The hard look by the public and the agency that could have addressed the inadequacies never occurs.[3] The NEPA process requires a public comment period that allows the agency and the public to fully evaluate the assumptions underlying a proposed action. The Corps short-circuited that process. Missouri just asks that the Corps be required to comply with the unambiguous mandates of the law.

The Corps also attempts to deflect attention from the crucial issue by suggesting that Missouri contends that the Corps did not consider enough alternatives. FD Mem. at 22-25. To the contrary, Missouri is concerned with the extremely broad range of alternatives that the Corps

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citations to the record are to the administrative record filed by the Corps, either in connection with this complaint or the prior multidistrict litigation, unless otherwise indicated.

[3]Although the Corps claims to have taken a hard look at the Revision, FD Mem. at 2, the plan adopted was a *fait accompli* long before the EA was even begun, MO Mem. at 14. A rubber stamp is not a hard look.

has studied, because the Corps now assumes that it has a free pass to adopt any changes to the Master Water Control Manual ("Master Manual") it chooses as long as there is some alternative among those previously studied whose impacts are arguably worse than the one the Corps wants to adopt.[4] This is not consistent with the purpose of the Master Manual or with NEPA. Therefore, the Corps' motion should be denied.

I. THE CORPS DOES NOT HAVE DISCRETION TO IGNORE THE EXPRESS REQUIREMENTS OF THE NEPA REGULATIONS.

The requirements of the NEPA regulations are clear. Except when there is a categorical exclusion, not applicable here, the agency must issue either an EIS or a FONSI. 40 CFR § 1501.4. The only purpose of an EA is to determine whether the action will have a significant impact on the environment, thus requiring an EIS. 33 C.F.R. § 230.10(a). The statute and the regulations are not vague or ambiguous, and they do not give the agency the discretion to follow some other process of the agency's choosing.

Nevertheless, the Corps suggests that the Court should defer to the Corps' conclusion that its makeshift process complies with NEPA. FD Mem. at 4-5, 20. The Corps does not identify a single case that allows an agency to substitute an EA for an EIS when the EA finds, as in this case, that the agency action will have a significant environmental impact. Instead, the Corps discusses cases in which there was a factual dispute about the agency's analysis in the EIS, *Friends of the Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115, 1127 (8th Cir. 1999), in the FONSI, *Arkansas Wildlife Federation v. U.S. Army Corps of Engineers,* 431 F.3d 1096, 1099

[4]The Corps repeatedly refers to "range of *impacts*" rather than "range of *alternatives*." The Corps thus emphasizes that it can adopt any operation - even if it has never been studied - so long as the Corps believes the impacts will be no greater than the impacts of alternatives it studied and rejected.

(8th Cir. 2005), or in determining that a categorical exclusion applied, *Friends of Richards-Gebaur Airport v. Federal Aviation Administration*, 251 F.3d 1178, 11886-87 (8th Cir. 2001), *cert. denied*, 535 U.S. 927 (2002).[5] In this case, however, the Corps never issued either an EIS or a FONSI for, or found a categorical exclusion applied to, the Revision. Missouri does not predicate its claim on the obvious analytical shortcomings of the EA, but on the Corps' failure to follow mandated procedures. This does not implicate the Corps' discretion or expertise, and no deference is due the Corps' decision to ignore proper NEPA procedures.

In *Arkansas Wildlife Federation v. U.S. Army Corps of Engineers,* the Corps changed the design of a program that it had adopted following the issuance of an EIS. 431 F.3d at 1103. The record established that the design change resulted in a net positive impact on the environment when compared to the original design. *Id.* Furthermore, the EA was issued for public comment and followed by a FONSI. *Id.* at 1099. Under these circumstances, the court held that the Corps did not need to issue an additional EIS for the change. *Id.* at 1004.

The Eighth Circuit distinguished the facts in *Arkansas Wildlife Federation* from *Dubois v. U.S. Department of Agriculture*, 102 F.3d 1273 (1st Cir. 1996):

> In *Dubois*, an agency adopted an alternative that had never before been considered nor disseminated for public comment, but appeared for the first time in the FEIS. *Dubois*, 102 F.3d at 1292. The First Circuit held that under these circumstances the agency was required to submit an SEIS. In contrast, the proposed changes in

[5]The Corps cites a fourth irrelevant decision, *Central Arizona Water Conservation District v. U.S. Environmental Protection Agency,* 990 F.2d 1531 (9th Cir.), *cert. denied*, 510 U.S. 828 (1993), which holds that a court must show deference to agency decisions involving technical rule making. *Id.* at 1539-40.

> the Project were presented for public comment and the FEA considered the potential environmental implications of these changes. Furthermore, unlike *Dubois*, the change in the Project is one of design, not the selection of a completely new and unconsidered alternative.

431 F.3d at 1103. As in *Dubois*, the Corps in this case has adopted an alternative that has never before been considered or disseminated for public comment. Also, the Revision is not a mere design change, but instead represents a completely new alternative. Finally, unlike *Arkansas Wildlife Federation*, the EA did not conclude that the Revision had a net positive environmental impact, but instead concluded that benefits were reduced in eight of fifteen categories compared. Ex. 3088, 091332-39. No FONSI was issued. Under these circumstances, as in *Dubois*, an EIS is required.

The Corps includes in its description of its substitute "NEPA Process" a lengthy discussion of four Plenary Group meetings held in the Summer of 2005 and the Corps' process in adopting its 2005-2006 Annual Operating Plan ("AOP"). FD Mem. 8-10 Neither process, however, is contemplated by the NEPA regulations. "NEPA requires that environmental information be available and subject to comment, review, and analysis by officials and citizens prior to making decisions." FD Mem. at 4. The only analysis - inadequate as it is - of the Revision ever provided by the Corps is the EA. The Corps does not and cannot contend that anyone was given the opportunity to review and comment on the EA, which was made public the day before the first scheduled spring rise. FD Mem. at 14. So the Corps pretends that the Plenary Group and AOP processes - neither of which provided any comparative analysis of the proposed spring rise plan - can somehow be considered a substitute for the NEPA process

provided by law. An invitation only, informal stakeholder group that the Corps largely ignored is no substitute for a proper NEPA process.[6] Nothing in the law or regulations permits this substitution.

II. COMPARISON OF THE REVISION TO PREVIOUSLY REJECTED SPRING RISE PLANS DOES NOT CONSTITUTE AN ANALYSIS OF THE REVISION.

The Corps' argument proceeds on an odd and illogical syllogism:

1. The Corps previously studied and rejected a number of spring rise plans.

2. The Corps now wants to adopt a different spring rise plan that was not studied.

3. The new spring rise plan is no worse than the worst alternatives that were previously rejected.

4. Therefore, the new spring rise plan does not need to be studied.

The conclusion simply does not follow from the premises.

Rather than explain this logical disconnect, the Corps suggests that Missouri questions the range of alternatives studied. FD Mem. at 22-27. The only question Missouri had was whether this range included just the alternatives compared in the EA or the virtually unlimited range studied in the whole EIS process leading to the adoption of the 2004 Master Manual. The Corps has answered: In the Corps' view, as long as the impacts of a change fall anywhere within the broadest range of impacts studied in the EIS process, no further NEPA analysis is required. FD Mem. at 10 n.5.

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[6]The Plenary Group appears to have been designed as cover for the Corps to reach its pre-ordained conclusion. The group did not reach consensus on much, but it did agree that there should be no spring rise if system storage was less than 40 million acre feet ("MAF"). Ex. 2935, 087321. The Revision adopted that consensus for the future, but set a 36.5 MAF limit for the first year of the rise. Ex. 3088, 091325. The analysis behind that decision cannot be found in the EA or anywhere else in the record.

Thus, Missouri's concerns were well-founded. The Revision was never studied. The fact that it is no worse than the worst of the plans previously studied gives little comfort that this plan makes any sense for the Missouri River. In fact, looking at the EA and the previously studied alternatives, there is no indication that this plan will have any beneficial impact on the pallid sturgeon, the sole reason for the spring rise. Without the full analysis, review, and comment process required by NEPA, it is impossible to determine whether this plan, among the infinite options available, best - or even adequately - serves the interests of the stakeholders in the Missouri River.[7]

Missouri does not object to the Corps' use of data from the FEIS, as long as it does sufficient due diligence to determine that the data is still accurate.[8] The Corps' reliance on rejected plans as the standard of measure for the efficacy of the Revision, however, is unprecedented. The 2004 Master Manual governs management of the Missouri River. The impacts of any change to river management can only be analyzed in comparison to the Master Manual, not to previously rejected management alternatives. To say that the Revision's impacts do not exceed the impacts of those rejected alternatives is not analysis of the Revision. And when the Revision is compared to the current Master Manual, the Corps' own analysis shows that the Revision fares worse in eight of the fifteen categories compared. The EA does nothing to justify the Corps' decision to decrease benefits by adopting the Revision.

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[7]The Corps also seeks to justify its EA because the impacts of the Revision are "well within historic operations." FD Mem. at 25. The Great Flood of 1993 is also within historic operations, but that does not make it a suitable measure of acceptable impacts.

[8]There is serious question that the Corps did so in this case. *See* MO Mem. at 17-20.

The Corps' position seems to be that it does not matter how bad the spring rise plan may be for other project purposes as long as the Fish and Wildlife Service ("FWS") determines it complies with the Endangered Species Act. *See* FD Mem. at 26-27. This is not the standard endorsed by the Eighth Circuit. *See In re Operation of the Missouri River System Litigation,* 421 F.3d 618, 629 n.7, 631 n.9 (8th Cir. 2005), *cert. denied, North Dakota v. U.S. Army Corps of Engineers,* 126 S. Ct. 1879 (2006), *Nebraska Public Power District v. U.S. Fish & Wildlife Service*, 126 S. Ct. 1880 (2006), *North Dakota v. U.S. Army Corps of Engineers*, 126 S. Ct. 1568 (2006)*; South Dakota v Ubbelohde,* 330 F.3d 1014, 1027-29 (8th Cir. 2003), *cert. denied, North Dakota v. Ubbelohde,* 514 U.S. 987 (2004). The Corps is charged with the responsibility for managing the river consistently with the priorities established by the Flood Control Act. Fear that the FWS might disagree with the Corps' discharge of that responsibility does not excuse abdicating decision-making power to the FWS. *See* FD Mem. at 4 ("[A] court may not require agencies 'to elevate environmental concerns over other, admittedly legitimate considerations.'" *Stryker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223, 227-28 (1980)).

III. MISSOURI HAS STANDING TO PURSUE THIS CLAIM.

Given the history of the litigation regarding the Master Manual, it is curious that the Corps has decided to make an issue of Missouri's standing in this case.[9]

In *South Dakota v Ubbelohde,* the Eighth Circuit held that the State of Nebraska had standing to intervene in litigation involving the Master Manual, stating simply: "And the

[9]Although standing was raised as an affirmative defense, counsel for the Corps assured Missouri's counsel that it was a *pro forma* pleading and that the Corps did not seriously doubt Missouri's standing. Based on that assurance, Missouri made no attempt to amend its complaint or otherwise supplement the record before the deadline for amending the pleadings -- which lapsed before the Defendants filed their motion.

Missouri River runs through the state of Nebraska." 330 F.3d at 1024. Nebraska and the other intervenors offered to present evidence that a reduction in flow would interrupt navigation, interfere with power plant operations and community water supplies, and present a risk to plovers and terns. *Id.*

The Missouri River runs through the state of Missouri, and a reduction in flood control or water supply can greatly impact the state. MO Mem. at 2-3; *see also* Supplemental Affidavit of Michael D. Wells (identifying specific impacts of Revision on Missouri). The Revision reduces benefits in eight of fifteen categories, including flood control and water supply, when compared to the Master Manual. Ex. 3088, 091332-39. It is absurd to suggest that Missouri is not injured when the Corps chooses to reduce the protection against flood[10] or water available for use in Missouri.

The Corps never raised the issue of Missouri's standing in the multidistrict litigation regarding the Master Manual. How can it now contend that Missouri does not have standing to challenge the Revision, which reduces the benefits available in comparison to the Master Manual?

This case presents the classic example of NEPA standing addressed in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992):

> [O]ne living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the agency's failure to prepare an environmental

[10]The EA clearly shows that the Revision reduces flood protection. Ex. 3088, 091332 & 091340. The Corps nevertheless contends that the Revision provides "similar" flood control protection, FD Mem. at 12, or the "same" protection, FD Mem. at 22. The record shows flood protection is not the same, but is, in fact, less under the Revision.

> impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.

Id. at 572 n.7. Missouri's Capitol Building sits within spitting distance of the Missouri's banks. The Corps is not constructing a dam - it already has several - but it is deciding how much water it will allow to flow from those dams, and when. Under these circumstances, it is undeniable that Missouri has *Lujan* standing. *See Friends of Marolt Park v. U.S. Department of Tansportation,* 382 F.3d 1088, 1095 (10th Cir. 2004)(NEPA injury-in-fact requires only increased risk of environmental harm and environmental harm injures plaintiff's interests); *see also Sierra Club v. Marsh*, 872 F.2d 497, 502-03 (1st Cir. 1989)(failure to comply with NEPA is irreparable injury).

The Supreme Court has long recognized a state's standing to pursue claims involving the rivers within the state's boundaries in original actions filed in the Court. *See, e.g.*, *Kansas v. Colorado*, 543 U.S. 86 (2004); *Texas v. New Mexico*, 482 U.S. 124 (1987); *Illinois v. Missouri*, 399 U.S. 146 (1970); *New Jersey v. New York*, 347 U.S. 995 (1954). A state surely does not lose the right to protect its interest in rivers within its boundaries when it is an agency of the federal government, rather than another state, that seeks to undermine those interests.

CONCLUSION

For the foregoing reasons, Missouri requests that the Court deny the federal defendants' motion for summary judgment.

Respectfully submitted,

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